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Vigny Alfred Raj a/l Vicetor Amratha Raja v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(L)-23–02 OF 2020(B)
ZAWAWI SALLEH, ZABARIAH YUSOF AND MARY LIM FCJJ
7 JULY 2022

C *Criminal Procedure — Discharge not amounting to acquittal ('DNAA') — Whether order of DNAA appropriate — Whether prosecution's reason that it could not continue with prosecution of accused as investigations against him were still ongoing not a good ground for court to order DNAA — Whether accused should not have been charged if investigations had not been completed — Whether*
D *court should not condone practice of 'charge now, investigate later' — Whether prosecution's reason for DNAA abused the criminal justice system and oppressed accused by having a criminal charge hanging over his head indefinitely — Whether accused should rightly be acquitted and discharged — Whether an order of discharge under s 254 (1) or (2) of Criminal Procedure Code ('CPC') did*
E *not amount to an acquittal unless Court specifically directed that it amounted to an acquittal — Whether view that words in s 254(3) CPC meant that an order of discharge under s 254 amounted to an acquittal unless otherwise directed by the court went against plain and literal meaning of s 254(3)*

F The appellant was charged in the High Court for being a member of an organised criminal group, an offence under s 130V of the Penal Code. He pleaded not guilty to the charge. On the day of his trial and before any evidence was led, the deputy public prosecutor ('DPP') informed the court that he would not be continuing with the prosecution of the appellant as investigations
G were 'still ongoing'. The DPP requested the court to order a discharge not amounting to acquittal ('DNAA') of the appellant under s 254 of the Criminal Procedure Code ('the CPC'). The appellant's counsel objected and said the proper order should be a discharge amounting to an acquittal ('DAA'). The High Court granted a DNAA on the grounds that: (a) the court had no power
H to acquit and discharge the appellant without hearing any evidence; and (b) under art 145 of the Federal Constitution, the power to prosecute or discontinue prosecution was vested in the attorney general/public prosecutor ('AG/PP'). The Court of Appeal ('COA') affirmed the High Court's decision. It held that the prosecution had 'good grounds' for asking the court to grant a
I DNAA as: (i) the 'trial of the case had not started' as no witnesses had been called to testify; (ii) the prosecution 'could not proceed for the time being as the investigation was still ongoing and they would proceed with the trial when they were ready'; and (iii) the High Court was right to refuse an acquittal 'in the absence of any evidence before the court'. At the hearing of the instant appeal

against the COA's decision, the DPP informed the court that the investigations into the offence with which the appellant was charged had been completed and the public prosecutor had decided not to proceed with the charge against the appellant. The DPP left it to the court to make what orders it deemed fit in the circumstances of the case. Pursuant to s 254(1) and (2) of the CPC, if at any stage of any trial — but before delivery of judgment — the prosecution informed the court that it would not further prosecute the accused upon the charge the accused shall be discharged of the charge. Section 254(3) provided that 'Such discharge shall not amount to an acquittal unless the court so directs'.

Held, unanimously allowing the appeal, setting aside the decisions of the courts below and acquitting and discharging the appellant. The court was, however, divided on the interpretation to be accorded to s 254(3) of the CPC:

(1) **(per Zabariah Yusof FCJ, concurring)** A plain and literal reading of s 254(3) of the CPC meant that any discharge granted by the court under s 254 was a discharge not amounting to an acquittal. In order for a discharge to amount to an acquittal, it had to be specifically directed by the court. The opening wordings in the section were clear and unambiguous; hence the court must give effect to their plain and literal meaning (see para 6).

(2) **(per Zabariah Yusof FCJ, concurring)** None of the authorities and cases referred to in the judgment of Mary Lim Thiam Suan FCJ herein ruled on the interpretation to be accorded to s 254(3) of the CPC to the effect that 'the Court has to specifically direct that the discharge does not amount to an acquittal. Otherwise, the default position is that the discharge amounts to an acquittal'. What those cases held was that the court was vested with the discretionary power to direct the acquittal of an accused person pursuant to s 254(3) of the CPC and that such discretion was to be exercised judiciously. In other words, s 254(3) did not fetter the discretion of the court in directing that the discharge amounted to an acquittal if the circumstances warranted it. The following cases supported this proposition: *Public Prosecutor v Ambika a/p MA Shanmugam* [2021] 2 MLJ 723; *Mohamed bin Kanathi Meerah Mydin v Public Prosecutor* [2019] 2 MLJ 194; *Goh Cheng Chuan v Public Prosecutor* [1990] 3 MLJ 401; *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166; *Seet Ah Ann v Public Prosecutor* [1950] 1 MLJ 293b; *Goh Oon Keow & Anor v Rex* [1949] 1 MLJ 35; and *Tan Ah Chan v Regina* [1955] 1 MLJ 218 (see para 7).

(3) **(per Zabariah Yusof FCJ, concurring)** A perusal of the written submissions of the appellant's counsel also never alluded to the proposition that s 254(3) of the CPC meant that 'the court has to specifically direct that the discharge does not amount to an acquittal.

Otherwise, the default position is that the discharge amounts to an acquittal'. It was limited to the concern that the court had the discretion/power/jurisdiction to order a discharge amounting to an acquittal to an accused person when the facts warranted it under s 254 of the CPC (see para 9).

(4) **(per Zabariah Yusof FCJ, concurring)** The facts and circumstances in the instant appeal justified that an order of DAA was granted to the appellant (see para 10).

(5) **(per Mary Lim FCJ)** The plain and clear meaning of the phrase 'such discharge shall not amount to an acquittal unless the court so directs' in s 254(3) of the CPC was that the court had to specifically direct that the discharge did NOT amount to an acquittal. Otherwise, the default position was that the discharge amounted to an acquittal (see para 48).

(6) **(per Mary Lim FCJ)** To suggest that the words 'unless the court so directs' conferred discretion on the court to direct that the discharge amounted to an acquittal was to read into s 254(3) words and an intent that were plainly not there. Such a construction, in effect, called for the incorporation of the word 'otherwise' in place of the word 'so' thereby changing the phrase and the provision to read as 'unless the court otherwise directs'. Such an exercise would amount to judicial legislating, a task which would offend the doctrine of separation of powers. The intention of s 254(3) was to confer discretion on the court to specifically direct that the discharge shall not amount to an acquittal. In the absence of such a direction, the discharge in the circumstances under s 254(1) amounted to an acquittal (see paras 63–64).

(7) **(per Mary Lim FCJ)** Implicit in s 254(3) was the recognition by Parliament of the fundamental principle of a presumption of innocence until proven guilty; that a charge should not hang over any person for an indeterminate or indefinite period. Any person accused of a crime was entitled to due process, must be accorded access to justice and was entitled to the equal protection of the law. In any case, if there was any ambiguity in s 254(3), it should be resolved in favour of the liberty of the subject. So, where the AG/PP had made up his mind not to continue with the prosecution and had in fact declined to prosecute further, the accused must be discharged and must stand acquitted of the charge. Only in exceptional circumstances and for sound and cogent reasons, and after balancing public interest against any unfairness to the accused, should the court exercise its discretion under s 254(3) to direct that the discharge shall not amount to an acquittal (see paras 66 & 87).

(8) **(per Mary Lim FCJ)** The grant of an order for DAA was fully warranted in the instant case. In the trial court, the prosecution had asked for a DNAA order after informing the court that the AG/PP had decided not

to continue with the prosecution of the charge against the appellant as 'the investigation was still going on'. There should not have been a charge in the first place if the investigations were still ongoing or were incomplete. The prosecution's reason for asking for a DNAA bordered on abuse and oppression that could not be endorsed by the court. It was obviously not in the public interest to grant such an order and encourage the abhorrent practice of 'charge now, investigate later' which served only to undermine the administration of criminal justice in this country. At the hearing of this appeal, the prosecution informed the court that the investigations had been completed and the PP had decided not to proceed with the charge against the appellant. Given these circumstances, the application for a DNAA by the prosecution ought to have been refused then, and with the prosecution now no longer pressing for a DNAA, the appellant must stand discharged and acquitted of the charge (see paras 90 & 92–95).

(9) **(per Mary Lim FCJ)** Contrary to the views expressed by the courts below, the power to order an acquittal under s 254 CPC was not constrained by the absence of witness testimony or of any infringement on the powers of the AG/PP under art 145 of the Federal Constitution. Section 254 was an available option the moment the charge was read over and explained to the accused and his plea thereto was taken. Section 254 was not at all dependent on evidence being first led by the prosecution or by any witness called to testify. It was an available option at any stage of the trial and could be invoked so long as judgment had not been delivered (see paras 34 & 95).

[Bahasa Malaysia summary

Perayu telah didakwa di Mahkamah Tinggi kerana menjadi ahli kumpulan jenayah terancang, satu kesalahan s 130V Kanun Keseksaan. Beliau mengaku tidak bersalah atas pertuduhan tersebut. Pada hari perbicaraannya, sebelum sebarang keterangan dibawa, timbalan pendakwa raya ('TPR') memaklumkan mahkamah bahawa beliau tidak akan meneruskan pendakwaan terhadap perayu kerana 'siasatan sedang berjalan'. DPP memohon mahkamah memerintahkan pelepasan tidak terjumlah pembebasan ('DNAA') perayu di bawah s 254 Kanun Tatacara Jenayah ('KTJ'). Peguam perayu membantah dan berkata perintah yang sepatutnya adalah pelepasan yang terjumlah pembebasan ('DAA'). Mahkamah Tinggi memberikan DNAA atas alasan bahawa: (a) Mahkamah tidak mempunyai kuasa untuk membebaskan dan melepaskan tanpa mendengar keterangan; dan (b) di bawah perkara 145 Perlembagaan Persekutuan, kuasa untuk mendakwa atau menghentikan pendakwaan terletak pada peguam negara/pendakwa raya. Mahkamah Rayuan ('MR') mengesahkan keputusan Mahkamah Tinggi. Ia memutuskan bahawa pihak pendakwaan mempunyai 'alasan kukuh' untuk memohon mahkamah memberikan DNAA kerana: (i) 'perbicaraan kes tersebut belum bermula'

kerana tiada saksi telah dipanggil untuk memberi keterangan; (ii) pihak pendakwaan 'tidak dapat meneruskan buat masa ini memandangkan siasatan masih berjalan dan mereka akan meneruskan perbicaraan apabila mereka bersedia'; dan (iii) Mahkamah Tinggi berhak menolak pembebasan 'sekiranya tiada sebarang keterangan di hadapan mahkamah'. Pada pendengaran rayuan semasa terhadap keputusan MR, TPR memaklumkan kepada mahkamah bahawa penyiasatan terhadap kesalahan yang didakwa perayu telah selesai dan pendakwa raya telah memutuskan untuk tidak meneruskan pertuduhan terhadap perayu. TPR menyerahkannya kepada mahkamah untuk membuat perintah yang difikirkan sesuai dalam keadaan kes tersebut. Menurut s 254(1) dan (2) KTJ, sekiranya pada mana-mana peringkat mana-mana perbicaraan — tetapi sebelum penyampaian penghakiman — pihak pendakwaan memaklumkan mahkamah bahawa ia tidak akan meneruskan pendakwaan tertuduh atas pertuduhan tertuduh hendaklah dilepaskan daripada pertuduhan tersebut. Seksyen 254(3) memperuntukkan bahawa 'pelepasan sedemikian tidak akan menjadi pembebasan melainkan mahkamah mengarahkan sedemikian'.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan mahkamah di bawah dan membebaskan serta melepaskan perayu. Mahkamah, bagaimanapun, berlainan pada tafsiran yang akan diberikan kepada s 254(3) KTJ:

(1) **(oleh Zabariah Yusof HMP, bersetuju)** Bacaan jelas dan literal bagi s 254(3) KTJ bermakna bahawa apa-apa pelepasan yang diberikan oleh mahkamah di bawah s 254 adalah pelepasan yang tidak berjumlah pembebasan. Untuk membolehkan pelepasan menjadi pembebasan, ia perlu diarahkan secara khusus oleh mahkamah. Kata-kata pembukaan dalam bahagian adalah jelas dan nyata; maka mahkamah mesti memberi kesan kepada maksudnya yang jelas dan literal (lihat perenggan 6).

(2) **(oleh Zabariah Yusof HMP, bersetuju)** Tiada satu pun daripada otoriti dan kes yang disebut dalam penghakiman Mary Lim Thiam Suan HMP di sini memutuskan tafsiran yang akan diberikan kepada s 254(3) KTJ dengan kesan bahawa 'mahkamah perlu mengarahkan secara khusus bahawa pelepasan tersebut tidak terjumlah kepada pembebasan. Jika tidak, kedudukan sedia ada adalah pelepasan tersebut terjumlah pembebasan'. Apa yang diputuskan oleh kes-kes tersebut adalah mahkamah diberi kuasa budi bicara untuk mengarahkan pembebasan seseorang tertuduh menurut s 254(3) KTJ dan bahawa budi bicara tersebut hendaklah dilaksanakan secara bijaksana. Dalam erti kata lain, s 254(3) tidak mengekang budi bicara mahkamah dalam mengarahkan bahawa pelepasan tersebut terjumlah pembebasan jika keadaan memerlukannya. Kes berikut menyokong cadangan ini: *Public Prosecutor v Ambika a/p MA Shanmugam* [2021] 2 MLJ 723; *Mohamed bin Kanathi Meerah Mydin v Public Prosecutor* [2019] 2 MLJ 194; *Goh Cheng Chuan*

v Public Prosecutor [1990] 3 MLJ 401; *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166; *Seet Ah Ann v Public Prosecutor* [1950] 1 MLJ 293b; *Goh Oon Keow & Anor v Rex* [1949] 1 MLJ 35; dan *Tan Ah Chan v Regina* [1955] 1 MLJ 218 (lihat perenggan 7).

(3) **(oleh Zabariah Yusof HMP, bersetuju)** Penelitian terhadap penghujahan bertulis peguam perayu juga tidak pernah merujuk kepada cadangan bahawa s 254(3) KTJ bermaksud bahawa 'mahkamah perlu mengarahkan secara khusus bahawa pelepasan tersebut tidak terjumlah kepada pembebasan. Jika tidak, kedudukan sedia ada pelepasan itu berjumlah pembebasan'. Ia terhad kepada kebimbangan bahawa mahkamah mempunyai budi bicara/kuasa/bidang kuasa untuk memerintahkan pembebasan terjumlah pembebasan kepada orang yang dituduh apabila fakta membenarkannya di bawah s 254 KTJ (lihat perenggan 9).

(4) **(oleh Zabariah Yusof HMP, bersetuju)** Fakta dan keadaan dalam rayuan semasa mewajarkan bahawa perintah DAA telah diberikan kepada perayu (lihat perenggan 10).

(5) **(oleh Mary Lim HMP)** Maksud yang jelas dan nyata bagi frasa 'pelepasan sedemikian tidak akan menjadi pembebasan melainkan mahkamah mengarahkan sedemikian' dalam s 254(3) KTJ adalah mahkamah secara khusus mengarahkan bahawa pelepasan tersebut tidak akan terjumlah kepada pembebasan. Sebaliknya, kedudukan sedia ada adalah pelepasan tersebut terjumlah kepada pembebasan (lihat perenggan 48).

(6) **(oleh Mary Lim HMP)** Untuk mencadangkan bahawa perkataan 'melainkan mahkamah mengarahkan sedemikian' memberikan mahkamah budi bicara untuk mengarahkan bahawa pelepasan tersebut terjumlah pembebasan adalah dibacakan dalam perkataan s 254(3) dan niat yang jelas tiada. Konstruktif sedemikian memerlukan penggabungan perkataan 'sebaliknya' menggantikan perkataan 'jadi' supaya frasa tersebut akan dibaca sebagai 'melainkan jika mahkamah mengarahkan sebaliknya'. Ia akan menjadi perundangan kehakiman yang menyangkal; yang amat bertentangan dengan doktrin pengasingan kuasa. Niat s 254(3) adalah untuk memberikan budi bicara kepada mahkamah untuk secara khusus mengarahkan bahawa pelepasan tersebut tidak terjumlah kepada pembebasan. Jika tiada arahan sedemikian, pelepasan dalam keadaan di bawah s 254(1) terjumlah pembebasan (lihat perenggan 63–64).

(7) **(oleh Mary Lim HMP)** Tersirat dalam s 254(3) adalah pengiktirafan oleh Parlimen terhadap prinsip asas anggapan tidak bersalah sehingga dibuktikan bersalah; bahawa suatu pertuduhan tidak boleh digantung ke atas mana-mana orang untuk tempoh yang tidak ditentukan atau tidak

ditetapkan. Mana-mana orang yang dituduh melakukan jenayah berhak mendapat proses yang sewajarnya, mesti diberikan akses kepada keadilan dan berhak mendapat perlindungan undang-undang yang sama rata. Walau apa pun, jika terdapat sebarang kekaburan dalam s 254(3), ia harus diselesaikan dengan memihak kepada kebebasan sesuatu subjek. Jadi, apabila AG/PP telah membuat keputusan untuk tidak meneruskan pendakwaan dan sebenarnya enggan mendakwa lebih lanjut, tertuduh mesti dilepaskan dan mesti dibebaskan daripada pertuduhan tersebut. Hanya dalam keadaan luar biasa dan atas sebab-sebab yang kukuh dan nyata, dan selepas mengimbangi kepentingan awam terhadap sebarang ketidakadilan terhadap tertuduh, seharusnya mahkamah menggunakan budi bicaranya di bawah s 254(3) untuk mengarahkan bahawa pelepasan tersebut tidak akan terjumlah pembebasan (lihat perenggan 66 & 87).

(8) **(oleh Mary Lim HMP)** Pemberian perintah untuk DAA adalah wajar sepenuhnya dalam kes semasa. Di mahkamah perbicaraan, pihak pendakwaan telah memohon perintah DNAA selepas memaklumkan kepada mahkamah bahawa AG/PP telah memutuskan untuk tidak meneruskan pendakwaan pertuduhan terhadap perayu kerana 'penyiasatan masih berjalan'. Seharusnya tidak ada pertuduhan pada mulanya sekiranya siasatan masih berjalan atau tidak lengkap. Alasan pendakwaan untuk memohon DNAA adalah penyalahgunaan dan penindasan yang tidak boleh disahkan oleh mahkamah. Ia adalah jelas sekali bukan kepentingan awam untuk memberikan perintah sedemikian dan menggalakkan amalan keji 'tuduh sekarang, siasat kemudian' yang hanya menjejaskan pentadbiran keadilan jenayah di negara ini. Pada pendengaran rayuan semasa, pihak pendakwaan memaklumkan kepada mahkamah bahawa siasatan telah selesai dan PP telah memutuskan untuk tidak meneruskan pertuduhan terhadap perayu. Memandangkan keadaan ini, permohonan untuk DNAA oleh pihak pendakwaan sepatutnya telah ditolak ketika itu, dan dengan pihak pendakwaan kini tidak lagi mendesak untuk mendapatkan DNAA, perayu mesti dilepaskan dan dibebaskan daripada pertuduhan (lihat perenggan 90 & 92–95).

(9) **(oleh Mary Lim HMP)** Bertentangan dengan pandangan yang dinyatakan oleh mahkamah di bawah, kuasa untuk memerintahkan pembebasan di bawah s 254 KTJ tidak dikekang oleh ketiadaan keterangan saksi atau sebarang pelanggaran terhadap kuasa AG/PP di bawah perkara 145 Perlembagaan Persekutuan. Seksyen 254 adalah pilihan yang ada sebaik pertuduhan dibacakan dan dijelaskan kepada tertuduh dan pengakuannya diambil. Seksyen 254 sama sekali tidak bergantung kepada keterangan yang pertama kali diketuai oleh pihak pendakwaan atau oleh mana-mana saksi yang dipanggil untuk memberi keterangan. Ia adalah pilihan yang tersedia pada mana-mana peringkat perbicaraan dan boleh digunakan selagi penghakiman belum

disampaikan (lihat perenggan 34 & 95).]

Cases referred to

Chu Chee Peng v PP [1973] 2 MLJ 35, FC (folld)
Goh Cheng Chuan v PP [1990] 3 MLJ 401; [1990] 1 LNS 85, HC (refd)
Goh Oon Keow & Anor v Rex [1949] 1 MLJ 35 (refd)
K Abdul Rasheed v PP; Ah Chak Arnold v PP [1985] 1MLJ 193 (refd)
Koh Teck Chai v PP [1968] 1 MLJ 166 (refd)
Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94; [1997] 1 CLJ 636, FC (refd)
Kuppusamy v PP [1948] 1 MLJ 25 (refd)
Mohamed bin Kanathi Meerah Mydin v PP [2019] 2 MLJ 194, CA (refd)
Perumal v PP [1970] 2 MLJ 265, FC (refd)
PP v Ambika a/p MA Shanmugam [2021] 2 MLJ 723, CA (not folld)
PP v Au Seh Chun [1998] 6 MLJ 179, HC (folld)
PP v Dato' Yap Peng [1987] 2 MLJ 311, SC (refd)
PP v Lee Chan Sang [1989] 1 MLJ 224, SC (refd)
PP v Sihabduin bin Haji Salleh & Anor [1980] 2 MLJ 273, FC (refd)
PP v Hettiarachigae LS Perera [1977] 1 MLJ 12 (refd)
PP v Marwan bin Ismail [2008] 3 MLJ 51, CA (refd)
PP v Mat Zain [1948–1949] supp MLJ 142 (refd)
PP v Ng Nam Onn [1964] 1 MLJ 455 (refd)
PP v Syed Abdul Bahari Shahabuddin [1976] 1 MLJ 87 (refd)
PP v Zainuddin & Anor [1986] 2 MLJ 100, SC (refd)
Seet Ah Ann v PP [1950] 1 MLJ 293b (refd)
Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209, FC (refd)
Tan Ah Chan v Regina [1955] 1 MLJ 218 (refd)
Tan Chow Cheang v PP [2018] 5 MLJ 411, CA (not folld)

Legislation referred to

Criminal Procedure Code ss 173, 173(c), (f), (f)(ii), (g), (m), (m)(i), (n), 178, 254, 254(1), (2), (3), 254A, Chapters VIB, XIX,
Criminal Procedure Code (Cap 68, 1985 Ed) (repealed by Criminal Procedure Code 2010) [SG] ss 180, 184, 184(2), 336(1)
Criminal Procedure Code 2010 [SG] ss 230, 232
Constitution of the Republic of Singapore [SG] art 35(3), (8)
Dangerous Drugs Act 1952 s 39B
Federal Constitution arts 5, 8, 145
Penal Code s 130V

Kamarul Hisham bin Kamaruddin (with Tiara Katrina bt Fuad & Ho Cheng En) (The Chambers of Kamarul Hisham & Hasnal Rezua) for the appellant.
Abdul Ghafar bin Ab Latif (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zabariah Yusof FCJ (delivering concurring judgment of the court):

[1] I have read the judgment of my learned sister, Mary Lim Thiam Suan FCJ on the appeal herein. Essentially the appeal deals with the issue of when should an order for discharge amounting to an acquittal under s 254 of the Criminal Procedure Code ('the CPC') be granted.

[2] I agree with the ultimate decision as stated in the said judgment that the facts in this case warranted for a direction of discharge amounting to an acquittal (DAA).

[3] However, I differ with my learned sister on the interpretation to be accorded to s 254(3) of the CPC with specific reference to para [48] of the judgment, which reads as follows:

> [48] But, s 254 does not stop there. Section 254(3) goes on to provide for the effect of the discharge; it expressly states that 'such discharge shall not amount to an acquittal unless the court so directs'; and it is the meaning and operation of s 254(3) which lies at the heart of this appeal. *In my view, the court has to specifically direct that the discharge does not amount to an acquittal. Otherwise, the default position is that the discharge amounts to an acquittal*. This is the plain and clear meaning of s 254(3), that the court has to so direct that the discharge does not amount to an acquittal, otherwise, the discharge amounts to an acquittal.

[4] The same interpretation was also applied by Her Ladyship in paras [50], [61]–[66] and [76] in the judgment.

[5] For ease of reference, I reproduced s 254(3) of the CPC hereunder:

> 254 (1) At any stage of any trial, before delivery of judgment, the public prosecutor may, if he thinks fit, inform the court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.
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> (2) At any stage of any trial before a sessions court or a magistrate's court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the court and, if so stayed, the accused shall be discharged of and from the same.
>
> (3) *Such discharge shall not amount to an acquittal unless the Court so directs*. (Emphasis added.)

[6] It is my view that, a plain and literal reading of s 254(3) of the CPC means that any discharge granted by the court under s 254, is a discharge not amounting to an acquittal. But for a discharge amounting to an acquittal, it

must be specifically directed by the court. The opening wordings of the section are clear and unambiguous, hence the court must give effect to its plain and literal meaning. In this regard the remarks by Suffian LP in *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 are relevant when His Lordship said:

> The words of Lord Diplock in an authority cited by my Lord President, *Duport Steels Ltd v Sirs* seems to me to be particularly apt, for the role of the judiciary is confined to ascertaining from the words that parliament has approved as expressing its intention what that intention was, and to giving effect to it. *Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.* (Emphasis added.)

[7] I have read and examined the authorities and cases referred to, in the judgment and found that, they never ruled on the interpretation to be accorded to s 254(3) of the CPC to the effect that 'the court has to specifically direct that the discharge *does not* amount to an acquittal. Otherwise, the default position is that the discharge amounts to an acquittal'. In my view, what those cases held were that, the court is vested with the discretionary power to direct an acquittal of an accused person pursuant to s 254(3) of the CPC and that such discretion is to be exercise judiciously. In other words, s 254(3) of the CPC does not fetter the discretion of the court in directing that the discharge to amount to an acquittal, if circumstances warrant it. The following cases support this proposition:

(a) *Public Prosecutor v Ambika a/p MA Shanmugam* [2021] 2 MLJ 723;

(b) *Mohamed bin Kanathi Meerah Mydin v Public Prosecutor* [2019] 2 MLJ 194;

(c) *Goh Cheng Chuan v Public Prosecutor* [1990] 3 MLJ 401;

(d) *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166;

(e) *Seet Ah Ann v Public Prosecutor* [1950] 1 MLJ 293b;

(f) *Goh Oon Keow & Anor v Rex* [1949] 1 MLJ 35; and

(g) *Tan Ah Chan v Regina* [1955] 1 MLJ 218.

[8] The case of *Goh Cheng Chuan v Public Prosecutor* (a Singaporean case) and *Public Prosecutor v Ambika a/p Shanmugam* are two cases which dealt specifically with the phrase 'unless the court so directs' which appears in s 254(3) of the CPC which is in pari materia with s 184(2) of the Singapore Criminal Procedure Code 1985. *Public Prosecutor v Ambika* relied on *Goh Cheng Chuan v Public Prosecutor*, which agreed with the decision of Lai Kew Chai J in *K Abdul Rasheed v Public Prosecutor Ah Chak Arnold v Public*

Prosecutor [1985] 1MLJ 193, at p 195 which states:

> Subsection [184(2)] begins with the proposition of law that such discharge shall not amount to an acquittal, followed by the crucial words 'unless the court so directs ...'. ... These crucial words plainly confer on the court the discretionary power to direct an acquittal and the power arises the moment the prosecution informs the court that it is not going on with the prosecution of the defendant upon the charge, whether or not the prosecution has decided forever to withdraw the charge.
>
> If an accused applies for a discharge amounting to an acquittal, a *court must bear in mind that the legislature has in the opening words of sub-s [184(2)] set down the principle that the discharge 'shall not' amount to an acquittal. There must be circumstances in the proceedings so far on record or the accused must show sufficient reasons to displace the principle that the discharge shall not amount to an acquittal*. In exercising its power under sub-s [184(2)] of the Code, a court must bear in mind and give due regard to the right of the prosecution to proceed at a later stage; *Seet Ah Ann v Public Prosecutor* [1950] 1 MLJ 293b. On the other hand, there is ample persuasive authority for the proposition that unless some good ground is shown it would not be right to leave an individual saddled with a charge in which proceedings are stayed for an indefinite period: *Goh Oon Keow & Anor v Rex* [1949] 1 MLJ 35, the dicta of Mr Justice Spencer-Wilkinson in *Public Prosecutor v Suppiah Pather* reported in the Editorial Note to *Ariffin bin Cassim Jayne v Public Prosecutor* [1953] 1 MLJ 126 which were approved in *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166, 167, by Ong Hock Sim J (as he then was). It is not desirable to set down any principle which a court must follow when acting under sub-s [184(2)] of the Code as if it is writ in stone and thereby fetter the discretion of the court which has to be judicially exercised. Circumstances do vary from case to case. Each case has to be dealt with on its merits, with the court bearing in mind the public interest and the right of the individual to which I have alluded. (Emphasis added.)

[9] In addition, a perusal of the written submissions by the appellant's counsel never alluded to the proposition that s 254(3) of the CPC means that 'the court has to specifically direct that the discharge does not amount to an acquittal. Otherwise, the default position is that the discharge amounts to an acquittal'. It is limited to the concern that the court has the discretion/power/jurisdiction to order a discharge amounting to an acquittal to an accused person when the facts warrant it under s 254 of the CPC.

[10] Save as aforesaid, I agreed that in the present appeal, the facts and circumstances herein justified for an order of a discharge amounting to an acquittal. The appeal was allowed. The orders of the High Court and the Court of Appeal were set aside.

[11] My learned brother Zawawi Salleh FCJ has read this judgment in draft and agreed with its contents.

Mary Lim FCJ:

[12] This appeal deals with an issue which frequently vexes the court in the exercise of its criminal jurisdiction, that is, when should an order for discharge amounting to an acquittal under s 254 of the Criminal Procedure Code ('the CPC') be granted. As is obvious, such an order or a refusal to grant this order has far-reaching implications. I am compelled to explain my views on the issue so that there is clear and proper guidance from this court.

[13] At the hearing of this appeal, the learned deputy public prosecutor ('DPP') rose to inform the court that the investigations into the offence for which the appellant is charged 'are completed' and the public prosecutor has 'decided not to proceed with the charge in this case against the appellant'. As to the appropriate orders that the court should make in such event, the learned DPP did not file any written submissions to this appeal, and offered no oral submissions except to say that the prosecution has decided to leave the answer to the issue 'to the wisdom of the court'. This is most unfortunate as I found no written submissions filed by the learned DPP in the courts below either; but that, thankfully, had not deterred both the High Court and the Court of Appeal in providing reasoned grounds for their respective decisions.

[14] While I did not have the benefit of wise counsel from the learned DPP, I was substantially and most ably assisted by both lead and junior counsel for the appellant. For this, I record my appreciation.

UNDISPUTED FACTS

[15] On 6 September 2018, the appellant was charged under s 130V of the Penal Code, a charge to which he entered a plea of not guilty after the charge was read to him:

> Bahawa kamu di antara 1 Januari 2015 hingga 7 Februari 2017, di alamat MV Empayar Sdn Bhd, No 1-B, Jalan Perniagaan Masria 1, Pusat Perniagaan Masria, Batu 9, Cheras, di daerah Hulu Langat, di dalam Negeri Selangor Darul Ehsan, telah didapati menjadi ahli kumpulan jenayah terancang 'Geng 360 Devan', dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 130V(1) Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

[16] Section 130V of the Penal Code is housed in Chapter VIB offences on organised crime. It provides that it is an offence to be a member of an organised criminal group:

> 130V (1) Whoever is a member of an organized criminal group shall be punished with imprisonment for a term *of not less than five years and not more than twenty years.

A (2) Until the contrary is proved, a person shall be presumed to be a member of an organized criminal group where —

(a) such person can be identified as belonging to an organized criminal group; or

B (b) such person is found with a scheduled weapon as specified under the Corrosive and Explosive Substances and Offensive Weapons Act 1958 [Act 357].

*NOTE — Previously 'which may extend to five years' — see s 7 of the Penal Code (Amendment) Act 2014 [Act A1471].

C

[17] On the day of trial, before any evidence was led, the learned DPP informed the court that after examining the charge, the prosecution decided not to continue with the prosecution of the charge against the appellant. In these circumstances, the learned DPP sought an order that the appellant be D discharged not amounting to an acquittal ('DNAA'). The application was made pursuant to s 254(1) of the Criminal Procedure Code ('the CPC'). According to the learned DPP, the court ought to grant an order of DNAA as 'the investigation [sic] still going on'.

E

[18] That order for a DNAA was vehemently opposed. Learned counsel for the appellant argued that the proper order to be entered is that the appellant be discharged forthwith and that the discharge amounts to an acquittal ('DAA').

F **[19]** After hearing submissions, the High Court granted an order of DNAA on the following grounds:

(a) according to settled law as found in *Public Prosecutor v Hettiarachigae LS Perera* [1977] 1 MLJ 12 and *Public Prosecutor v Zainuddin & Anor* [1986] 2 MLJ 100, the court does not have the power to acquit and G discharge the appellant without hearing any evidence; and

(b) pursuant to art 145 of the Federal Constitution, power to prosecute was vested in the Attorney General.

H

[20] The decision of the High Court was affirmed on appeal. The Court of Appeal reasoned that the prosecution had 'good grounds' for asking the court to grant a DNAA:

(a) the 'trial of the case has not started' as no witnesses had been called to I testify; and

(b) the prosecution 'cannot proceed for the time being as the investigation was still ongoing and that they would proceed with the trial when they are ready'.

[21] The Court of Appeal further reasoned that the High Court was right in refusing an acquittal 'in the absence of any evidence before the court'.

DECISION

[22] As indicated at the outset, the issue here concerns the construction and interpretation of s 254 of the CPC, when and under what circumstances may an order of DAA be granted by the court.

[23] Section 254 of the CPC reads as follows:

> *Public Prosecutor may decline to prosecute further at any stage*
>
> (1) *At any stage of any trial*, before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.
>
> (2) At any stage of any trial before a Sessions Court or a Magistrates Court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same.
>
> (3) *Such discharge shall not amount to an acquittal unless the Court so directs*. (Emphasis added.)

SUMMARY TRIALS

[24] Before I consider s 254 in detail, I pause to observe that the two cases relied on by the High Court, namely *Public Prosecutor v Hettiarachigae LS Perera*, and *Public Prosecutor v Zainuddin & Anor*, do not concern s 254 at all. Both cases dealt with and concerned the procedure in summary trials as laid down in Chapter XIX of the CPC (Summary Trials by Magistrates); more specifically, the powers of the magistrates to discharge an accused in such trials under s 173(g).

[25] Quite aside from the fact that the High Court in the instant appeal was obviously not dealing with a summary trial, it is also clear that the terms of s 173(g) differ substantially and materially from those found in s 254. Section 173 reads as follows:

> 173 Procedure in summary trials
>
> The following procedure shall be observed by Magistrates in summary trials:
>
> (a) When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be

framed and read and explained to him, and the accused shall be asked whether he is guilty of the offence charged or claims to be tried;

(b) If the accused pleads guilty ...

(c) If the accused refuses to plead or does not plead or claims to be tried, the Court shall proceed ...

(d) When the Court thinks it necessary it shall obtain from the accused ...

(e) The accused shall be allowed to cross-examine ...

(f) (i) When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a prima facie case against the accused.

(ii) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.

(g) Nothing in paragraph (f) shall be deemed to prevent the Court from discharging the accused at any previous stage of the case if for reasons to be recorded by the Court it considers the charge to be groundless.

[26] What is also clear from the grounds of judgment is that the learned judge failed to alert himself to this significant difference let alone attempt to explain why the position of law under s 173(g) nevertheless applied to his understanding of s 254. Similarly, the Court of Appeal. This is regretful as the interpretation and application of any law, more so in the case of punitive laws, must always be undertaken carefully and responsibly.

[27] On the subject of summary trials under s 173, there is actually a carefully scripted step-by-step procedure for such trials. It starts from the moment the accused is brought to court, the requirement that the charge be read and explained to him and, the need to ask for his plea to the charge. Where the accused pleads guilty, whether as framed or as amended, the court can then pass sentence subject to conditions such as ensuring that the accused understands the nature and consequences of his plea and so on. Where the accused refuses to plead or claims to be tried, s 173(c) mandates the court to proceed to take all such evidence as may be produced in support of the prosecution. At the end of the case for the prosecution, the court is required under s 173(f) to consider if the prosecution has made out a prima facie case for the charge. Where the court finds that the prosecution has failed to do so, the court must record an acquittal of the accused — see s 173(f)(ii). This must be right since evidence has been led and the court is deciding on the substantive merits of the prosecution case. Hence, the view in *Kuppusamy v Public Prosecutor* [1948] 1 MLJ 25 that a magistrate cannot acquit until the evidence of the prosecution has been heard.

[28] However, s 173(g) reserves discretion to the court to discharge an

accused even before this stage, that is, 'at any previous stage of the case' but this is subject to the condition that the court considers the charge to be groundless. Noticeably, s 173(g) does not expressly provide that such discharge amounts to an acquittal. Arguably, a discharge under s 173(g) is not an acquittal in which case, fresh proceedings may be initiated for the same offence.

[29] The scope and purpose of s 173(g) has been ably explained by Ong CJ in *Chu Chee Peng v Public Prosecutor* [1973] 2 MLJ 35 and I adopt the same:

> Thus, when the whole of s 173 is viewed in logical order, it will be seen that para (g) has a good *raison d'etre* for its interposition between paras (f) and (h) et seq. it is to be remembered that the procedure in s 173 is for summary trials. There are constantly cases coming up in subordinate courts where the very corner-stone in the prosecution case collapses at an early stage for a variety of reasons. In that event, should the Magistrate continue in the profitless labour of hearing the rest of the prosecution to the bitter end, whilst realising that at the close of the prosecution he would surely have to pronounce a verdict of acquittal? Without the express powers given to him by para (g) the futile exercise is inevitable. Therefore the paragraph provides that:
>
> > (g) Nothing in paragraph (f) shall be deemed to prevent the Court from discharging the accused at any previous stage of the case if for reasons to be recorded by the Court it considers the charge to be groundless.
>
> But Magistrates may occasionally be over-hasty; they may have misdirected themselves or fallen into error in other ways, when deciding to dismiss a case without wasting any more time on the prosecution. Accordingly they are required to state their reasons for so doing and, lest their error lead to irremediable consequences, they are authorised only to discharge the accused: not, be it noted, to 'acquit' him.

[30] Similarly, Harun J in *Public Prosecutor v Hettiarachigae LS Perera* pointed out that in a summary trial, the powers of the magistrate to acquit 'can only be exercised either under s 173(f) at the close of the prosecution case when there is no case to answer or under s 173(m)(i) at the close of the defence when the court finds the accused not guilty'. His Lordship noted that apart from these two provisions, 'a magistrate may order a discharge amounting to an acquittal when the Public Prosecutor declines to prosecute further at any stage before delivery of judgment under s 254 of the Criminal Procedure Code'. His Lordship however recognised that the magistrate may discharge under s 173(g) before the close of the case for the prosecution or s 173(n) before calling upon an accused to enter upon his defence 'but the discharge under these provisions does not amount to an acquittal'.

[31] In *Hettiarachigae LS Perera*, Harun J had called the case up for a revision, noting from the record that no evidence for the prosecution had been heard and neither had the prosecution declined to prosecute. All that the

prosecution was seeking was an adjournment. In such circumstances, the only power to order a discharge was under s 173(g) where the magistrate considers the charge to be groundless. On the facts, this was not supported in which case, the decision of the magistrate to discharge and acquit the accused was set aside and the case was remitted to the magistrate for disposal according to the provisions of the CPC.

SECTION 254

[32] But all this is entirely different from s 254, the provision of law under which the High Court in the instant appeal was invited by the learned DPP to exercise its powers. Section 254 deals specifically with the situation where the public prosecutor or the prosecuting officer declines to prosecute any further with the trial which is already ongoing in court. That situation does not arise under s 173.

[33] Section 254 operates at any stage of a trial, and it is invoked by the public prosecutor ('PP'). Although the shoulder note of s 254 states that the 'public prosecutor may decline to prosecute further at any stage', the substantive provisions in s 254 provide that it is at any stage of trial so long as it is before judgment is delivered. The question then arises as to when proceedings in court may be properly regarded as trial proceedings, when does a trial commence.

[34] Pursuant to s 178 of the CPC, trial commences when the charge is read and explained to the accused and he is asked whether he is guilty of the offence charged or he claims to be tried. This was explained in *Public Prosecutor v Marwan bin Ismail* [2008] 3 MLJ 51 citing *Perumal v Public Prosecutor* [1970] 2 MLJ 265. See also Srimurugan Alagan in *The Criminal Procedure Code: A Commentary with Appellate Practice & Procedure*, p 357 para 254-4. Thus, contrary to the views of the High Court and the Court of Appeal, s 254 operates and is an available option the moment the charge is read and explained to the accused and the accused pleads to the charge. Section 254 is not at all dependent on evidence being first led by the prosecution or any witness called to testify. Section 254 remains an available option throughout the trial, is available at any stage of the trial, and it may be invoked so long as judgment has not been delivered — see *Public Prosecutor v Lee Chan Sang* [1989] 1 MLJ 224.

[35] The distinction between ss 173(f) and 254 in this respect of discharge was in fact dealt with in *Public Prosecutor v Au Seh Chun* [1998] 6 MLJ 179. This case, too, was a case called up for revision by the High Court, a power for reasons which are not immediately apparent, does not appear to be fashionable lately. After perusing the file from the magistrates' court, Suriyadi J (as His Lordship then was) said:

It must be borne in mind that a discharge under s 254 cannot be equated with a discharge under s 173(g) of the Criminal Procedure Code as the latter section envisages a situation where it is used in the sense of an accusation or allegation of an offence. Jagannadhadas J in *The State of Bihar v Ram Naresh* (1957) CR LJ 567 at p 571 when discussing s 494 of the old Indian Criminal Procedure Code which corresponds with our s 254 said:

> For instance the discharge that results therefrom need not always conform to the standard of 'no prima facie case' ... or of 'groundlessness' under s 253(2) Criminal PC (corresponds to s 173(g) of the Malaysian Criminal Procedure Code).

Under s 254, at any stage of any trial before the delivery of judgment, the public prosecutor may inform the court that he will not further prosecute the charge and thereupon the accused shall be acquitted. In other words there is no necessity for the magistrate to consider further as to the viability of the charge but merely to acquit and discharge the accused after being informed. Under this provision, unlike that of s 173(f), the evidence is yet to be heard or adduced by the prosecution. Where the proposal of not continuing with the prosecution comes from the prosecuting officer, leave must first be obtained from the court. This difference of approach is perhaps due to the desire of Parliament to permit the court to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purpose by the latter's prosecutors (*The State of Bihar v Ram Naresh* (1957) Cr LJ 567).

Under this provision, such discharge shall not amount to an acquittal unless the court so directs. In other words, for him to be recorded to have been acquitted, must be pursuant to the pro-active act of the learned magistrate who must so specify the details. Notwithstanding this supposed room given to the magistrate, it is quite established that whenever the prosecution has indicated to the court that it is not interested in pursuing the matter, the court then shall acquit the accused.

[36] Save for the opinion on the meaning of the words 'unless the court so directs' (that is, 'for him to be recorded to have been acquitted, must be pursuant to the pro-active act of the learned magistrate who must so specify the details'), I agree with His Lordship's views as stated above. In this case, the accused had requested for a discharge not amounting to an acquittal when the police repeatedly failed to supply him with the documents ordered by the trial Court. The magistrate granted the request. According to the records, the prosecution was unable to supply the documents in question due to administrative problems then 'besetting the local constabulary' and had sought an adjournment in order to comply. In His Lordship's view, the adjournment ought to have been granted as the matter did not fall within the purview of either ss 173(g) or 254 given that the conditions for the invocation of those provisions were not presented. Further, the prosecution never indicated that he was not interested in further prosecuting the accused on the charge.

[37] Section 254 requires a conscious or deliberate invocation by the prosecution, that he will not further prosecute the accused in respect of the charge for which trial has already commenced. It must not be confused with an application for an adjournment for any number of reasons, a situation which was highlighted in *Public Prosecutor v Au Seh Chun* and which frequently happens. But, first, the matter of the powers of the public prosecutor.

SECTION 254 AND THE POWERS OF THE PUBLIC PROSECUTOR

[38] Where the public prosecutor or the prosecuting officer declines to prosecute any further with the trial which is already ongoing in court, s 254 specifically provides for its consequence(s). Implicit in s 254 is the power of the public prosecutor under art 145 of the Federal Constitution to discontinue any criminal prosecution. This was explained by the Supreme Court in *Public Prosecutor v Lee Chan Sang* [1989] 1 MLJ 224:

> Section 254 of the Criminal Procedure Code deals with the power of the Public Prosecutor to decline to prosecute further at any stage of the trial. After Merdeka this provision finds its basis in art 145(3) of the Federal Constitution which provides that it is in the Attorney General's discretion to discontinue any criminal proceeding in the civil courts ...

[39] Srimurugan Alagan in his *The Criminal Procedure Code: A Commentary with Appellate Practice & Procedure* (2nd Ed, Sweet & Maxwell) opines that this 'section merely amplifies the powers of the public prosecutor, namely, the power to discontinue a criminal prosecution', as provided in art 145 of the Federal Constitution. This power to discontinue was also recognised in *Hettiarachigae LS Perera* with Harun J commenting that until the Attorney General 'makes up his mind the courts have to wait'. I have no issue with that construct, in fact, that position of the law is generally correct.

[40] Where the Attorney General as PP has made up his mind, the law has provided in s 254 the consequences or orders that the court may make in response to such a decision. I would immediately dispel all misconception that any order made by the court as a consequence to being informed by the learned DPP that the AG/PP has decided not to continue with the prosecution, does not in any way amount to an interference of or impingement on, the AG's powers under art 145 of the Federal Constitution. Such orders include an order discharging and acquitting an accused under s 254.

[41] The powers of the AG as provided under art 145 are not exclusive or absolute; nor are such powers immutable. This was observed by Eusoffe Abdoolcader SCJ in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; and lately echoed by this court in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209. The fact that the trial has already

commenced should drive home this reality, that the conduct of criminal proceedings in court is very much the judgment and within the powers and jurisdiction of the court.

[42] Furthermore, in the matter of the type of order that a court should appropriately make in any given circumstances, no one including the AG/PP, has a right to dictate the prescripts or terms of the order. More so where the AG as PP is no longer interested in prosecuting the charge and short of a withdrawal of the charge by the AG, it must surely be a matter of judgment of the court as to what order should follow from such a vocalised choice. The AG is in no position to make a finding of guilt, let alone order a discharge or an acquittal. The parties, counsel and the AG may suggest and invite the court to consider certain terms but the power, discretion and jurisdiction to pronounce a judicial order ultimately and solely belongs to the court and we, judges, guard those mandates jealously as part of our constitutional oath. The High Court was thus in error when it reasoned that there will be an infringement of the AG's powers under art 145 of the Federal Constitution if the court were to make an order of acquittal and discharge following the AG's intimation of disinterest in pursuing the charge in court.

[43] Returning then to s 254, this provision envisages two scenarios where a trial may come to a premature end because the AG has made up his mind and as 'public prosecutor has declined to prosecute further'. First, under s 254 (1) where the prosecution is by the public prosecutor/PP (generally, this would be at the High Court); second, under s 254(2) where the prosecution is by a prosecuting officer and such prosecution is before either the sessions or magistrates court.

[44] Broadly, where the AG/PP informs the court of that decision, the trial is stayed and the accused is discharged from the charge. Where the decision is made by the PP, the stay of the trial is mandatory whilst in the case of a trial before the lower courts, stay is discretionary. This is readily discerned from the use of the term 'may' in s 254(2) as opposed to 'shall' in s 254(1).

[45] But, it is not the issue of stay that is the focus of my present deliberations; it is the issue of what is the effect of a discharge under either instance and what orders or directions the court should make when the AG/PP indicates that he will not further prosecute. For this, s 254(3) specifically provides that 'such discharge shall not amount to an acquittal unless the court so directs'.

A SECTION 254(3)

[46] Reminding myself that on the day of trial before the High Court, trial being fixed because the appellant had claimed trial after entering a plea of not guilty, the learned DPP had informed the court that after examining the charge, the prosecution had decided not to continue with the prosecution of the charge against the appellant. At this point in time, no evidence had yet to be led by the prosecution. Under these circumstances, the learned DPP sought an order under s 254(1) that the appellant be discharged not amounting to an acquittal; such an order being sought because 'the investigation [sic] still going on'.

[47] The learned DPP is perfectly entitled to make that decision, that he will not further prosecute the appellant upon the charge for which the appellant had already entered his plea. As pointed out, that choice is within the purview of the AG under art 145 of the Federal Constitution. However, once that decision is conveyed to the court, it is for the court to decide what order is most appropriate to make. That decision, of course, depends on the law and on the facts. The law is as set out in s 254(1) and it provides that the proceedings shall be stayed and insofar as the charge is concerned, the appellant shall be discharged from the charge. The prefix 'dis' in the word 'discharge' connotes the opposite or reversative meaning to the root or primary word 'charge'; meaning that there is no longer a charge. Thus, consequent to the non-pursuit of prosecution by the AG, by the terms of s 254(1), the appellant stands discharged from the charge under s 130V of the Penal Code. Since the effect of the AG's decision has already been provided for in s 254(1), the High Court, quite rightly must accordingly order the discharge.

[48] But, s 254 does not stop there. Section 254(3) goes on to provide for the effect of the discharge; it expressly states that 'such discharge shall not amount to an acquittal unless the court so directs'; and it is the meaning and operation of s 254(3) which lies at the heart of this appeal. In my view, the court has to specifically direct that the discharge does not amount to an acquittal. Otherwise, the default position is that the discharge amounts to an acquittal. This is the plain and clear meaning of s 254(3), that the court has to so direct that the discharge does not amount to an acquittal, otherwise, the discharge amounts to an acquittal. And, it is the duty of the court to give the terms of the statute its plain and unambiguous meaning — see Federal Court in *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273; *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94; [1997] 1 CLJ 636.

[49] There are sound reasons for this provision and some indications were given in the case of *Public Prosecutor v Mat Zain* [1948–1949] supp MLJ 142.

There, an accused who had been previously charged with the offence of robbery and discharged not amounting to an acquittal after the charge was withdrawn, was rearrested four months later and charged for the same offence. After expressing dissatisfaction with the conduct and delay in the whole proceedings, Callow J made the following observation:

> I do not know the reason for this or the nature of the charge preferred but a discharge amounting to an acquittal should be in exceptional circumstances. I presume the withdrawal was made by the prosecuting officer in accordance with section 254 of the Criminal Procedure Code. This procedure may be caused by it becoming clear that the charge is not sustainable (*Sohoni* (14th Ed) p 651), or for reasons of expediency, the court should record the reason, *and the discharge should amount to an acquittal unless good cause is otherwise shown*; an accused person is entitled to trial and determination; only in exceptional circumstances should the charge be permitted to remain indefinitely held against him. (Emphasis added.)

[50] I believe His Lordship meant that 'a discharge not amounting to an acquittal should be in exceptional circumstances', consistent with the rest of his opinion that 'only in exceptional circumstances should the charge be permitted to remain indefinitely held against him'. This is also in line with my view that the phrase 'unless the court so directs' means that the court must specifically direct that the discharge does not amount to an acquittal unless the court so directs. Otherwise, the default position is that the discharge amounts to an acquittal. This position is similar to where the public prosecutor withdraws the charge or enters a *nolle prosequi*, that the discharge amounts to an acquittal — see *Public Prosecutor v Ng Nam Onn* [1964] 1 MLJ 455:

> Thereupon the magistrate made an order for discharge *simpliciter* and not acquittal. This clearly is wrong. When there is no acquittal an accused person is liable to be retried on the same charge. Accordingly, when the deputy public prosecutor decided to enter a *nolle prosequi*, it is not fair to have a charge hanging over an accused person indefinitely. It has been the established practice to acquit in such cases. Therefore, acting in revision, under s 323 of the Criminal Procedure Code, I direct that the order made be amended to one of acquittal.

[51] Consequently, the power in s 254(3) to discharge an accused person without acquitting him 'is a power which should be exercised sparingly and grudgingly and only where the court is satisfied for good cause shown that the public interest insistently demands that it be used', as per Ong Hock Sim J in *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166, adopting the earlier stance posited by Abbott J in *Seet Ah Ann v Public Prosecutor* [1950] 1 MLJ 293b. Citing *Goh Oon Keow & Anor v Rex* [1949] 1 MLJ 35 and *Tan Ah Chan v Regina* [1955] 1 MLJ 218; His Lordship added:

> Our courts have consistently adopted the line that unless some very good ground is shown, it would not be right to leave an individual for an indefinite period with a charge hanging and lingering over him. As Mr Justice Spenser-Wilkinson said in *Public Prosecutor v Suppiah Pather* reported in Editorial Note to *Ariffin bin Cassim*

Jayne v Public Prosecutor:

> If the prosecution are not ready to proceed with their case after reasonable adjournments have been granted, an accused person should not be allowed to suffer from the dilatoriness of the prosecution by being left with a charge hanging over his head indefinitely.
>
> Where the prosecution are unable to proceed for the time being owing to the difficulty of obtaining a witness or for some other cause and are unable to satisfy the court that they will proceed with the prosecution within a reasonable time, then there would be good grounds for a discharge not amounting to an acquittal. In this case, however, although counsel apparently only asked for a discharge not amounting to an acquittal I think the proper order would have been a discharge amounting to an acquittal.

[52] *Tan Ah Chan v Regina* was also decided by Mr Justice Spenser-Wilkinson where His Lordship referred to his own earlier dicta in *Public Prosecutor v Suppiah Pather* and several other cases, to remind of 'the numerous decisions of the courts in this country to the effect that unless good cause is otherwise shown a discharge under this section should amount to an acquittal'.

[53] In *Koh Teck Chai*, the learned magistrate ordered the accused be discharged such discharge not amounting to an acquittal on the application of the prosecuting officer. This was strongly opposed, that no grounds had been given in support of such an application in which case the discharge should amount to an acquittal. After a short adjournment, the prosecuting officer returned citing subpoena could not be served as a civilian witness could not be traced, that departmental action probably may be taken against the accused. The DNAA was then ordered by the magistrate on ground that he 'had no power under the Criminal Procedure Code to discharge the accused, amounting to an acquittal without a trial'.

[54] This was corrected by HS Ong J, that there was a misconstruction of the ruling in *Kuppusamy v Public Prosecutor* [1948] 1 MLJ 25, that an order of acquittal in summary trials can only be made under paras (f), (g) and (m) of s 173 of the Criminal Procedure Code (FMS Cap 6). According to His Lordship, a summary trial nevertheless could avail itself to the application of s 254, that the learned magistrate had power under s 254 to order a discharge amounting to an acquittal:

> It in no way was meant to rule out the application of s 254(ii) of the FMS Code as Mr Justice Murray-Aynsley as he then was in that case said:
>
> > Section 254(ii) provides such discharge shall not amount to an acquittal unless the court so directs, except in cases coming under s 171. Such discharge means, however, discharge under s 254. Therefore for a discharge to amount to an

acquittal without a special order of the magistrate it must fall within the provisions of s 254 as well as of section 171.

Section 187(1) of the SS Code is identical with s 254(ii) and the application was made under that section so that it is clear that the learned magistrate has power to order an acquittal.

[55] After examining the reasons put forth by the prosecuting officer, HS Ong J varied the order of the magistrate and directed that the discharge should amount to an acquittal. His Lordship however, cautioned that the power under s 254 'should be exercised sparingly and grudgingly and only where the court is satisfied for good cause shown that the public interest insistently demands that it be used'.

[56] The requirement for satisfactory, good and cogent reasons for the sparing exercise of this exceptional power is a necessary corollary to the unerodable basic principle in criminal justice, that there is a presumption of innocence until due process has found otherwise. It is thus the duty of the court to be vigilant to ensure that there is no oppression or dilatoriness, blindly acceding to the powers of the prosecutor when there is no call to do so — see *Goh Oon Keow*, remarks made in the context of summary trials but no less applicable in any context.

[57] Unfortunately, in *Tan Chow Cheang v Public Prosecutor* [2018] 5 MLJ 411, the Court of Appeal viewed an order of DNAA as not a final order in light of the introduction of s 254A in 2010. Under a DNAA, an accused can be recharged and the case be continued from where it stopped. Consequently, it was 'premature at this stage for the order made be appealed against'. The scope and meaning of s 254(3) were thus not examined, with the Court of Appeal indicating that the decisions of *Koh Teck Chai* and *Syed Abdul Bahari Shahabuddin* were all pre-2010 decisions which now have to be relooked in view of s 254A.

[58] I disagree. Section 254A reads:

254A Reinstatement of trial after discharge

(1) Subject to subsection (2), where an accused has been given a discharge by the court and he is recharged for the same offence, his trial shall be reinstated and be continued as if there had been no such order given.

(2) Subsection (1) shall only apply where witnesses have been called to give evidence at the trial before the order for discharge has been given by the court.

[59] Sections 254 and 254A are entirely separate provisions catering for different conditions. The position of s 254 is as I have discussed whilst s 254A

operates only where the discharge does not amount to an acquittal and where the accused is indeed recharged for the same offence. In such a situation, the trial is reinstated and then continued 'as if there had been no such order given'. The fact that there is provision for a reinstatement of the trial prior to the DNAA does not mean that the DNAA is not a final order. The propriety of the direction ordered stands to be challenged.

[60] Recently, the Court of Appeal in *Public Prosecutor v Ambika a/p MA Shanmugam* [2021] 2 MLJ 723 had occasion to examine the meaning of the words 'unless the courts so directs' in s 254(3), opining that the phrase is 'plain and clear' and should be given its literal meaning; that 'it clearly means that although the discharge shall not amount to an acquittal but the court is also given the discretionary power to direct for discharge amounting to an acquittal'.

[61] While I agree that the phrase 'unless the court so directs' confers discretion on the court to give suitable and appropriate directions on the effect of the discharge, I disagree with the Court of Appeal in *Ambika* that the discretion lay in whether to direct that the discharge amounts to an acquittal. As pointed out, it is the contrary that is the correct position in law. The court must specifically direct that the discharge in s 254(1) does not amount to an acquittal, otherwise the discharge amounts to an acquittal. The discretion is in considering why the court should direct that the discharge shall not amount to an acquittal.

[62] Section 254(3) must be read in its entirety, that the latter phrase 'unless the court so directs' refers to the earlier phrase 'such discharge shall not amount to an acquittal'; otherwise that latter phrase of 'so direct' has no meaning or purpose at all. There would be nothing for the court to direct if the earlier phrase connotes the meaning given by the Court of Appeal in *Ambika* and by the courts below in this appeal.

[63] To suggest that the words 'unless the court so directs' is to confer discretion to direct that the discharge amounts to an acquittal is to read into s 254(3) words and an intent which are plainly not there, a course which the court must always avoid. Such a construction in effect calls for the incorporation of the word 'otherwise' in place of the word 'so', changing the phrase and the provision to now read as 'unless the court otherwise directs'. Such an exercise would amount to judicial legislating, a task which would offends the doctrine of separation of powers.

[64] I am of the view that the intention of s 254(3) is to confer discretion on the court to direct that the discharge does not amount to an acquittal. In other words, the court must specifically direct that the discharge shall not amount to

an acquittal. In the absence of a direction by the court, the discharge in the circumstances under s 254(1) amounts to an acquittal. The word 'so' is in reference to the state or terms of order in the earlier phrase in s 254(3) that the court has to direct.

[65] Perhaps and without running contrary to what I have just said is to move the word 'so' to the end of the sentence to now read as 'such discharge shall not amount to an acquittal unless the court directs so'. I make this suggestion as this is really the colloquial way of speaking but in proper grammarian drafting language, the terms are 'unless the court so directs'. It must also not be forgotten that our CPC takes its roots in the CPC of the Federated Malay States (FMS Cap 6) of 1935 and s 254(3) has remained in the language and terms as originally enacted. Hence, frequently the court pronounces terms of an order and conclude with the words 'so ordered' or 'so direct'.

[66] Implicit in s 254(3) is the recognition by Parliament of the fundamental principle of a presumption of innocence until proven guilty, that a charge cannot hang over any person for an indeterminate or indefinite period. That would be most harsh, inhumane and, illegal. Any person accused of a crime is entitled to due process, must be accorded access to justice and is entitled to the equal protection of the law — see arts 5 and 8 of the Federal Constitution. In any case, if there is any ambiguity in s 254(3), Suffian LP had categorically opined in *Public Prosecutor v Sihabduin & Anor* that '... in criminal law because of the cardinal principle that an accused person is presumed innocent and that it is the duty of the prosecution to prove his guilt, any ambiguity in a statute must be resolved in favour of the liberty of the subject'. So, where the AG/PP has made up his mind not to continue with the prosecution and has in fact declined to prosecute further, the accused must be discharged and must stand acquitted of the charge. It must only be in exceptional circumstances and for sound cogent reasons that the court is to exercise its discretion under s 254(3) and direct that the discharge shall not amount to an acquittal, paving way for the AG/PP to recharge the person at a later date for the same offence.

[67] In *Ambika*, the Court of Appeal had relied on *Goh Cheng Chuan v Public Prosecutor* [1990] 3 MLJ 401; [1990] 1 LNS 85, a decision of the High Court of Singapore, to support its conclusion that s 254(3) conferred discretion on the court as to whether the discharge should amount to an acquittal; otherwise the discharge does not amount to an acquittal.

[68] Once again, *Goh Cheng Chuan* was also a summary trial under s 180 of the then Criminal Procedure Code and the court declined to order a DAA under s 184. I understand that the CPC (Cap 68, 1985 Rev Ed) has since been repealed and replaced with the Criminal Procedure Code 2010 (Act 15 of

2010) with effect from 2 January 2011. Section 180 which deals with summary trials is now governed by s 230 of the CPC 2010. The old s 184 which was under consideration in *Goh Cheng Chuan* now appears as s 232 in the CPC 2010 reads as follows:

> (1) At any stage of any summary trial before judgment has been delivered, the Public Prosecutor may, if he thinks fit, inform the court that he will not further prosecute the defendant upon the charge and thereupon all proceedings on the charge against the defendant shall be stayed and he shall be discharged from and of the same.
>
> (2) Such discharge shall not amount to an acquittal unless the court so directs except in cases coming under section 177.

[69] Aside from my earlier observations on summary trials which apply with equal force here, the trial in *Goh Cheng Chuan* had been postponed several times at the behest of the prosecution, principally due to its difficulty in tracing a material witness. On the mention date fixed after an adjournment sought by the prosecution had been allowed, the DPP applied to discharge the accused, the discharge not to amount to an acquittal for two reasons — the prosecution still could not locate the material witness and, it had every intention of proceeding with the charge once the witness was traced and found. The district judge granted the order despite the strong objections of the accused, reasoning that the DNAA was a 'course that cannot be countermanded' due to the role of the public prosecutor under s 336(1) of the Criminal Procedure Code and art 35(8) of the Constitution of the Republic of Singapore, a position not unlike our art 145 of the Federal Constitution. The district judge also declined to follow Lai Kew Chai J's decision in *K Abdul Rasheed v Public Prosecutor; Ah Chak Arnold v Public Prosecutor* [1985] 1MLJ 193, finding that it was decided *per incuriam* in not having taken into consideration the role and responsibility of the AG, as PP, on the institution, conduct and continuance or otherwise of all criminal prosecutions.

[70] On appeal, Thean J made several observations.

[71] First, on the lower court's reliance on s 336(1) of the CPC and art 35(3) of Singapore's constitution, Thean J held that he did 'not see the relevance of these provisions on the operation of s 184 of the Criminal Procedure Code 1985 and on the nature and effect of an order of discharge made under that section'. Next, His Lordship found the district judge in error when holding that 'where the public prosecutor has informed the court that he will not 'further prosecute' the accused and further makes it clear that he intends eventually to proceed with his prosecution of the accused on the charge, it becomes not only abundantly clear that the order discharging the accused shall not amount to an order of acquittal as well but a course that cannot be countermanded'.

[72] According to Thean J, the information of the prosecution as to its future prosecution of the charge 'forms part of the material for the court to consider whether it should, pursuant to s 184(2), exercise its discretion and order that the discharge shall amount to an acquittal'. Once the prosecution had informed the court that it will not further prosecute, s 184 comes into operation:

> ... Upon the prosecution informing the court that it will not further prosecute the accused on the charge, the section comes into operation, and by virtue of its express terms all the proceedings on the charge against the accused are stayed and the accused is discharged and such discharge shall not amount to an acquittal unless the court so directs or except in cases coming under s 177 (this section is irrelevant for the purpose of this appeal). Therefore, in an ordinary case, the order of discharge under s 184 does not amount to an acquittal. That this is the nature of the order is dictated by the express terms of the section and not by what the prosecution told the court as regards its intention on the future prosecution of the accused on the charge.

[73] However, on the facts, the prosecution had failed to properly indicate its invocation of s 184. This was not favourably regarded with the learned judge observing as follows:

> However, it is to be observed that the deputy public prosecutor in invoking this section never uttered a word to the effect that she would 'not further prosecute' the accused. On the contrary, in applying for 'an order of discharge not amounting to an acquittal' she said, among other things, that 'the prosecution [had] every intention to proceed against the two accused' once the material witness was found. This ingenious move, it seems to me, was adopted to obviate the difficulty which was considered to be faced by the prosecution in *Abdul Rasheed* [1985] 1 MLJ 193. Such a move is undesirable, as it is unclear and confusing. If that section is invoked, it can only operate on the basis that the prosecution 'will not further prosecute' the accused. The decision whether to prosecute or not rests entirely with the prosecution: it is for the prosecution to decide whether or not it will further prosecute the accused on the charge in question; if it so decides not to do so, it ought to inform the court in clear terms.

[74] I would, likewise advocate for such proper practice and conduct from the prosecution, particularly having regard to what we have to said about the operation of our s 254. I note that Thean J had also held that the district judge was in no position to invoke the *per incuriam* rule, under the principle of stare decisis. His Lordship held that in any event, the decision in *K Abdul Rasheed* was not made *per incuriam*, as Lai J was 'clearly aware of the role played by the public prosecutor and also the provision of s 180 of the Criminal Procedure Code' but was of the opinion that the discretion under s 184(2) was unfettered and that s 180 was irrelevant for the purpose of his exercise of discretion.

A **[75]** However, in the matter of the interpretation of s 184(2), Thean J held that this provision gave the court 'an unfettered discretion to direct in appropriate circumstances, that the discharge shall amount to an acquittal'. In this regard, I disagree.

B **[76]** As I have pointed out, albeit in the context of summary trials, s 184(2) of the then CPC of Singapore which is similar to our s 254(3) actually confers discretion on the court to direct, in appropriate circumstances, that the discharge shall not amount to an acquittal. The burden remains with the prosecution to satisfy the court why, having initiated criminal proceedings C against an offender, then having decided to not further prosecute the offender upon the charge and having informed the court of such intent, the prosecution still insists that the discharge which must follow shall or must not amount to an acquittal. That being so, it must be for the prosecution to apply for the direction under s 254(3) that the discharge shall not amount to an acquittal, to D prevent the operation and natural effect and outcome of a discharge under s 254(1) or (2). The Court of Appeal in *Ambika* was thus in error in relying on *Goh Cheng Chuan*.

E **[77]** For completeness, I will deal with *K Abdul Rasheed v Public Prosecutor; Ah Chak Arnold v Public Prosecutor* [1985] 1MLJ 193, cited in *Goh Cheng Chuan* and recently by the Court of Appeal in *Mohamed bin Kanathi Meerah Mydin v Public Prosecutor* [2019] 2 MLJ 194. I do so to illustrate the care that must be taken when referring and relying on any authority, particularly where F the provisions of law differ.

[78] There were actually two appeals in *K Abdul Rasheed* before Lai Kew Chai J from two separate orders of the magistrate ordering the respective accused, *Ah Chai* and *K Abdul Rasheed*, be discharged not amounting to an G acquittal. In *Ah Chak*, the DPP had informed the District Court that the prosecution was unable to proceed because of the unavailability of witnesses while in *K Abdul Rasheed*, the DPP merely applied for an order for a DNAA without offering any reasons why it was not going on with the prosecution. Counsel for *Ah Chak* applied for a DAA under s 183(2) but the court declined, H holding that where the DPP has not informed the court that it will not further prosecute the accused upon the charge(s), 'there was nothing in the provisions of the CPC which would empower me to discharge the accused amounting to an acquittal'. As for *K Abdul Rasheed*, his counsel objected to the prosecution's request and had asked for a DAA to which the court declined and instead I granted a DNAA.

[79] Lai Kew Chai J was of the view that the meaning of the phrase 'he (the public prosecutor) will not further prosecute the defendant upon the charge' under Singapore's s 183 of the Criminal Procedure Code [which in substance is

similar to our s 254] was capable of two possible meanings. The first is where the PP informs the court that for some reason, such as unavailability of a prosecution witness, the PP will not at that stage when the case comes up for hearing, 'go on with the prosecution of the defendant upon the charge ... that he has decided that he will not take the prosecution beyond what has gone on up to that stage'. The second is where the PP informs the court that 'he will not ever prosecute the defendant on the charge'.

[80] In respect of *Ah Chak*'s appeal, Lai Kew Chai J disagreed with the district court who, in His Lordship's opinion had 'fallen into error' when taking the second meaning, that it was giving s 183(2) a 'narrow and restrictive scope'. His Lordship further held that s 183(2) plainly conferred discretion on the court to direct an acquittal and that the discretionary power arises the moment the prosecution informed the court that it is not going on with the prosecution of the defendant on the charge, regardless whether prosecution has decided to forever withdraw the charge, or only at that stage:

> ... Section 183(2) begins with the propositions of law that such discharge shall not amount to an acquittal, followed by the crucial words 'unless the court ...'. I need not refer to the cases coming within s 176 of the Code as they are irrelevant for present purpose. These crucial words plainly confer on the court the discretionary power to direct an acquittal and the power arises the moment the prosecution informs the court that it is not going on with the prosecution of the defendant upon the charge, whether or not the prosecution has decided forever to withdraw the charge. (Emphasis added.)

[81] Although Lai J cited the earlier decisions of *Goh Oon Keow & Anor v Rex*; the dicta of Justice Spenser-Wilkinson in *Public Prosecutor v Suppiah Pather* reported in Editorial Note to *Ariffin bin Cassim Jayne v Public Prosecutor Tan Ah Chan v Regina* which was approved by HS Ong J in *Koh Teck Chai v Public Prosecutor*, His Lordship took the position that it was for the accused to invoke s 183(2) and apply for a discharge amounting to an acquittal; and that it was for the accused to show 'sufficient reasons to displace the principle that the discharge shall not amount to an acquittal'. Having made these observations, Lai J then proceeded to examine the reasons put forth by the prosecution for a DNAA as well as the circumstances to date in *Ah Chak*'s appeal before holding that 'it would be unfair to subject him to any further agony and I directed that the discharge should amount to an acquittal'. As for *K Abdul Rasheed*, His Lordship similarly ordered a discharge amounting to an acquittal after finding that the district court did not act judicially and had not considered both the public interest and any unfairness to the accused when ordering a DNAA. According to Lai J, 'a consideration of one aspect without the consideration of the other was not a proper exercise of power of the court under sub-s 183(2) of the Code'.

[82] The decision in *K Abdul Rasheed* was recently relied on by the Court of Appeal in *Mohamed bin Kanathi Meerah Mydin v Public Prosecutor*, to support the proposition that a trial judge has discretion to direct an acquittal under s 254(3). However, that discretion is exercisable on application; and it appears to be on application by the accused.

[83] In *Mohamed bin Kanathi*, the charge under s 39B of the Dangerous Drugs Act 1952 against the co-accused was withdrawn on the first day of trial. Following this, the court ordered a DNAA against the co-accused. The co-accused then testified against the appellant as PW1. Although it acknowledged that 'unless some good grounds are shown, it would not be right to leave PW1 saddled with a charge hanging over his head for an indeterminate period', the Court of Appeal following *K Abdul Rasheed* held that PW1 himself did not apply for a discharge amounting to an acquittal; hence that option was not available. The Court of Appeal nevertheless proceeded to acquit and discharged the appellant for reasons unrelated to the exercise of discretion within s 254(3) itself; that it was due to the erroneous admission of PW1's evidence which if now excluded meant the collapse of the prosecution's case against the appellant. The discharge amounting to an acquittal was not because of the first principle that a discharge amounts to an acquittal unless the court is invited to direct for a discharge not amounting to an acquittal under s 254(3). This was despite the court acknowledging that there 'was ample persuasive authority for the proposition that unless some good grounds are shown, it would not be right to leave PW1 saddled with a charge hanging over his head for an indeterminate period'.

[84] Thus, as properly understood, s 254(3) is not dependent on an application by the accused for the discharge to amount to an acquittal. On the contrary, it is for the prosecution to apply to the court for a direction that the discharge shall not amount to an acquittal. And, as repeatedly said, the court should only so direct sparingly, grudgingly and in exceptional circumstances after it is properly satisfied with the reasons proffered by the prosecution. Surely the same may not be said in the case for granting a discharge amounting to an acquittal.

[85] Further, the fact that the learned DPP invoked s 254 and sought an order of a DNAA with the explanation that 'the investigation [sic] still going on', tacitly acknowledges that it is incumbent on the prosecution to seek a direction under s 254(3); that it is not for the accused to seek a DAA; and that it is for the prosecution to provide strong and satisfactory reasons for the trial court to exercise its discretion and direct a DNAA under s 254(3). Faced with such an application, the court must ascertain from the prosecution whether the prosecution intends to proceed against the accused at a later stage, and the reasons for not proceeding presently — see Srimurugan Alagan in *The*

Criminal Procedure Code: A Commentary with Appellate Practice & Procedure, p 360 para 254-8.

[86] It is a question of fact dependent on the circumstances presented, what may amount to good grounds for the exercise of the discretion in s 254(3). Some guidance, however, may be gleaned from the decision of *Public Prosecutor v Syed Abdul Bahari Shahabuddin* [1976] 1 MLJ 87. That was yet another case called up on revision where Abdoolcader J (as His Lordship then was) held:

> ... when there is no reasonable prospect of a case proceeding as a result of the absence of one or more witnesses or for some other cogent reason, then the prosecution should act under the provisions of s 254 of the Criminal Procedure Code. Subsection (iii) of s 254 specifically enacts that a discharge under that section shall not amount to an acquittal unless the court so directs. *It is settled law that unless there are good grounds to the contrary a discharge under this provision should amount to an acquittal*. Good grounds for a discharge not amounting to an acquittal would arise where the prosecution is unable to proceed for the time being but can satisfy the court that the temporary impediment is not insurmountable and that it will proceed within a reasonable time. This seems to be the *raison d'etre* for the scheme providing for a discharge not amounting to an acquittal. (Emphasis added.)

[87] On the proper judicial exercise of discretion under s 254(3), Lai Kew Chai J's comments in *K Abdul Rasheed* on the need to balance between public interest and any unfairness to an accused although articulated in the context of summary trials, is also worthy of repetition. In considering whether discretion ought to be exercised to direct that the discharge shall not amount to an acquittal, a DNAA, the court must always balance public interest against the right of the accused to not have a charge hanging over his head worse than an albatross, undetermined for an indefinite period, lingering long after the AG/PP has clearly informed the court of his intent not to prosecute further.

[88] When the AG makes clear such intent, the duty is upon the court to order that the accused be discharged from the charge and for clarity and to put beyond doubt, the court ought to specify that the discharge amounts to an acquittal. It is only where the AG is minded to invite the court to exercise its discretion and direct that the discharge shall not amount to an acquittal that the court is to turn its attention to the factors for so directing. Otherwise, the discharge must amount to an acquittal.

[89] It may, in fact, be properly argued that s 254(3) is enacted to safeguard and protect the rights of the accused under the Federal Constitution, especially arts 5 and 8, by providing that a discharge shall not amount to an acquittal unless the court so directs. Any court, faced with such a request, must therefore only so direct that the discharge shall not amount to an acquittal after it is satisfied on proper and just grounds to give such a direction.

[90] In this appeal, the learned DPP had asked the High Court to grant an order of a DNAA after informing that the AG/PP had decided not to continue with the prosecution of the charge against the appellant as 'the investigation [sic] still going on'. This explanation is both troubling and telling.

[91] In *Public Prosecutor v Au Seh Chun*, Suriyadi J in discussing when an order for a DAA may be ordered by the court under s 173(f) alluded to a hypothetical scenario where a request for an adjournment of an ongoing trial is sought on the basis that investigation is yet to be completed. His Lordship explained that it would be quite proper for the court to consider the charge as being groundless under s 173(f) if it be a summary trial as 'no self-respecting deputy public prosecutor will charge a person unless the investigation is considered complete. It is only at the end of the investigation that the executive action is determined'. By executive action, His Lordship was referring to the decision to charge.

[92] I agree with that view. There should not have been a charge in the first place if the investigations were 'still going on' or incomplete. It would be an aberration and a travesty on the administration of criminal justice if the courts were seen to condone a practice of charge now, investigate later. The prosecution's reason for a direction of DNAA under s 254(3) borders on abuse and oppression that cannot be endorsed by the court. In effect, had this been a summary trial, it would have shown that the prosecution had a groundless case and the accused must be acquitted and discharged.

[93] What is even more glaring is that at the hearing of this appeal, learned DPP had informed this court that the investigations into the offence for which the appellant is charged 'are completed' and the public prosecutor has 'decided not to proceed with the charge in this case against the appellant'. Given these circumstances, the application for a DNAA by the prosecution ought to have been refused then; and with the prosecution now no longer pressing for a DNAA, the appellant must stand discharged and acquitted of the charge.

[94] Clearly, there was no good or sound let alone decent ground, whether then or now, for the High Court to grant the order of DNAA. It is obviously not in the public interest to grant such an order and encourage such abhorrent practice which serves only to undermine the administration of criminal justice in this country.

CONCLUSION

[95] For the reasons explained, it is patently clear that the circumstances for a direction of discharge amounting to an acquittal, a DAA, was fully warranted in this case. Contrary to the reasonings of the courts below, I do not find the

power to direct an acquittal constrained by the absence of witness testimony before the court; that the reason offered by the prosecution for a no acquittal discharge or DNAA was not at all a good or satisfactory ground for the court to exercise its special power for such an order under s 254(3) of the CPC; and that the order for a discharge amounting to an acquittal or a DAA does not infringe on the powers of the Attorney General as public prosecutor under art 145 of the Federal Constitution.

[96] For all these reasons and as answered above, the appeal is allowed. The orders of the High Court and the Court of Appeal are set aside; the appellant is discharged and acquitted on the charge under s 130V of the Penal Code.

Appeal allowed; orders of High Court and Court of Appeal set aside; and appellant discharged and acquitted.

Reported by Ashok Kumar